IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0734-17

Ex parte RUSSELL BOYD RAE, Appellant

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS MARION COUNTY

KELLER, P.J., filed a dissenting opinion in which YEARY and KEEL, JJ., joined.

Driving while intoxicated (DWI) is a felony offense if the defendant has two prior final convictions for certain intoxication-related offenses.[1] In this habeas action, the Court vacates Appellant's felony DWI conviction because one of the prior convictions alleged by the State in its charging instrument was not final. I agree that the prior conviction in question was not final, but that conclusion is not sufficient to dispose of this case because there is an outstanding question about harm.

The record suggests that there may be another (third) prior conviction that was final that the

[1] *See* TEX. PENAL CODE § 49.09(b), (c), (d).

State could have alleged that would have enabled the State to establish the requisite two priors. If so, then it could be argued that, under our decision in *Ex parte Parrott*,[2] Appellant suffered no cognizable harm and should be denied relief on habeas. Consequently, I would remand this case to the court of appeals to determine whether *Parrott* would apply if Appellant had another prior conviction that could have been used to establish felony DWI, and if so, to abate and remand to the trial court to determine whether there was another such conviction.

I. BACKGROUND

In 1985, Appellant was convicted of DWI. In 1993, he was convicted of boating while intoxicated (BWI) and placed on probation. Sometime before 2003, Appellant was convicted of felony DWI, with the 1985 and 1993 convictions alleged as the requisite priors. In 2003, we granted habeas relief from this felony DWI conviction because the 1993 BWI conviction was not final and therefore not available for enhancement purposes.[3] We remanded Appellant to the custody of the Sheriff to answer the charging instrument.[4] The record does not establish whether the State then prosecuted Appellant for misdemeanor DWI. In 2015, Appellant again drove while intoxicated. For this conduct, he was convicted of felony DWI, with the 1985 and 1993 convictions alleged as the requisite priors.

The 1993 conviction is again alleged to be unusable, but this record raises the question of whether the State had another DWI conviction that was final. If, after getting relief from his felony

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[2] 396 S.W.3d 531 (Tex. Crim. App. 2013).

[3] *Ex parte Rae*, No. 74840 (Tex. Crim. App. December 3, 2003) (not designated for publication).

[4] *Id.*

DWI, Appellant was prosecuted in the same case for misdemeanor DWI and convicted, and if that conviction was final at the time of his current conviction, then that misdemeanor DWI conviction would have been available as a jurisdictional prior.

II. ANALYSIS

The general rule in habeas is that an applicant must show harm to obtain relief.[5] In *Parrott*, we held that this general rule applies even to illegal-sentence claims.[6] We further held that, when a sentence is illegal because a prior conviction alleged by the State for enhancement purposes is not usable for enhancement purposes, the habeas applicant has not been harmed if there was another prior conviction that could have been used in its place.[7] In other words, the habeas applicant has not been harmed by an illegal sentence caused by an unusable prior conviction if the applicant's "actual criminal history supports his sentence."[8]

This case differs from *Parrott* in that Appellant's prior convictions were used as jurisdictional elements of the offense rather than merely for enhancement purposes. But the rationale for applying *Parrott* is, to a large degree, the same. We said in *Cain v. State* that even a lack of jurisdiction can be subject to a harm analysis,[9] and what was said there on direct appeal would seem

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[5] *Parrott*, 396 S.W.3d at 534.

[6] *Id.* at 534-35. *See also Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016).

[7] *Id.* at 533-44, 536-37.

[8] *Id.* at 536. *See also Wright*, 506 S.W.3d at 481.

[9] 947 S.W.2d 262, (Tex. Crim. App. 1997) (Except for certain federal constitutional errors labeled by the United States Supreme Court as 'structural,' no error, whether it relates to *jurisdiction*, voluntariness of a plea, or any other mandatory requirement, is categorically immune to a harmless error analysis.") (emphasis added).

to apply even more strongly on habeas.[10] The fact of a prior conviction, and the finality of that conviction, is simply an issue of the defendant's prior criminal record, which can be established by official documents. It is hard to imagine a jurisdictional error that is more amenable to a harm analysis than one in which the defendant's prior criminal history shows that there was a prior conviction sufficient to establish jurisdiction over a repeat DWI offense.

Neither of the parties have briefed this issue, and we need not decide it now. The State prevailed in the courts below on the basis that the BWI conviction was final, and thus usable. Our decision to overturn those rulings has now generated the issue of whether *Parrott* could apply to render the defect harmless.[11] I do not claim that the issue is so clear-cut that we should hold *Parrott* to be applicable without briefing. Instead, I would follow the usual practice of remanding to the court of appeals to address the issue.[12]

I respectfully dissent.

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[10] *See Parrott*, 396 S.W.3d at 534 n.6 (procedural differences between direct appeal and habeas support harm analysis on habeas even when not required on direct appeal); *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996) ("Traditionally, on habeas corpus review involving federal constitutional error that is subject to a harmless error analysis, we have placed on the defendant the burden of proving, by a preponderance of the evidence, that the error contributed to his conviction or punishment.").

[11] *See McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014) (A party that prevailed in a lower court need not have presented to an appellate court that reverses when the issue "was essentially generated by the . . . appellate court's particular manner of disposing of the claim on appeal.").

[12] *See id.* (Remand to court of appeals to address a remaining issue is ordinarily appropriate, but we have sometimes varied from that practice in the name of judicial economy when the "proper disposition of an outstanding issue is clear.").